**Editor's note: Reconsideration granted in part, denied in part; decision reaffirmed as clarified by decision at 132 IBLA 36 (Feb. 9, 1995)**

POWDERHORN COAL CO.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 93-458 Decided March 18, 1994

Appeal from a decision of Administrative Law Judge Ramon M. Child granting an application for temporary relief from a notice of violation.
DV 93-7-R.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Temporary Relief: Applications--Surface Mining Control and Reclamation Act of 1977: Temporary Relief: Evidence

While the term "substantial likelihood of success," required to be shown by an applicant for temporary relief from a citation under sec. 525(c) of SMCRA, is not defined in the statute or regulations, the relief is basically in the nature of a stay or injunction. Hence, if the balance of hardship from not granting temporary relief tips decidedly in favor of the applicant, it is not necessary that the applicant's right to prevail on the merits of the controversy be free from all doubt where the applicant "has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation."

APPEARANCES: John S. Retrum, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Office of Surface Mining Reclamation and Enforcement; M. Julia Hook, Esq., and Kenneth D. Hubbard, Esq., Denver, Colorado, for the Powderhorn Coal Company.

OPINION BY ADMINISTRATIVE JUDGE GRANT

The Office of Surface Mining Reclamation and Enforcement (OSM) has appealed from a June 2, 1993, decision of Administrative Law Judge Ramon M. Child, granting an application by the Powderhorn Coal Company (Powderhorn) for temporary relief from notice of violation (NOV) No. 93-020-370-001

issued by OSM with respect to surface impacts associated with underground coal mining operations at the Roadside/Cameo No. 1 mine in Mesa County, Colorado. 1/

The instant case concerns surface reclamation operations conducted by Powderhorn in connection with the Roadside/Cameo No. 1 mine, under State permit C-81-041 issued by the Colorado Mined Land Reclamation Division (now the Colorado Division of Minerals and Geology (DMG)). At all relevant times, Colorado was a primacy State, meaning that it had and continues to have primary jurisdiction over the regulation of surface coal mining operations (including surface reclamation operations in connection with an underground mine) on non-Federal lands under an approved State program. However, such jurisdiction is not exclusive. See 30 CFR 906.30 (Cooperative Agreement at ¶ 19). As we have consistently held, OSM has oversight authority under section 521 of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1271 (1988), and its implementing regulations (30 CFR 842.11(b)(1) and 843.12(a)(2)) to intercede to enforce a State program where the state fails, after notice, to do so. 2/ See W.E. Carter, 116 IBLA 262, 266-67 (1990); Donaldson Creek Mining Co. v. OSM, 111 IBLA 289, 296 (1989), aff'd, Donaldson Creek Mining Co. v. OSM, No. 89-0314-P (CS) (W.D. Ky. July 18, 1991); Dora Mining Co. v. OSM, 100 IBLA 300, 302 (1987).

In particular, OSM is required, where it has reason to believe that a permittee is in violation of a state program, to issue a 10-day notice (TDN) to the state. See 30 U.S.C. § 1271(a)(1) (1988); 30 CFR 842.11(b)(1). Unless the state, within 10 days of receiving the TDN, takes "appropriate action" to cause the violation to be corrected or shows good cause for failure to do so, OSM is required to immediately inspect the surface coal mining operation. See 30 U.S.C. § 1271(a)(1) (1988); 30 CFR 842.11(b)(1). "Appropriate action" is defined to include "enforcement or other action authorized under the State program to cause the violation to be corrected." 30 CFR 842.11(b)(1)(ii)(B)(3) (emphasis added). See Dora Mining Co. v. OSM, supra at 303 ("The crucial response of a State is to take whatever * * * action is necessary to secure abatement of the violation" (quoting 47 FR 35627-28 (Aug. 16, 1982)). The term "appropriate action" is further defined by regulation as "an action or response by a State regulatory authority that is not arbitrary, capricious, or an abuse of discretion under the state program." 30 CFR 842.11(b)(1)(ii)(B)(2); see In Re Permanent Surface Mining Regulation Litigation, 653 F.2d 514, 523 (D.C. Cir.), cert. denied, 454 U.S.

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1/ The decision was made in the form of a verbal ruling at a hearing on the record held in Denver, Colorado (Tr. 214-15). Following the hearing, Judge Child issued an order on June 29, 1993, approving the record of the hearing.

2/ In addition, to the extent that the permit area encompasses Federal lands, we note that Colorado had and continues to have primary authority over such lands, for the purposes of enforcing the State program, pursuant to a cooperative agreement between the Secretary of the Interior and the State. See 30 CFR 906.30. However, that does not preclude the exercise of OSM's oversight enforcement authority.

822 (1981) ("[T]he Secretary will not intervene unless [the State's] discretion is abused").

The fact that the State has taken action to enforce the regulatory requirements by issuing an NOV is not dispositive of the question of whether the State regulatory authority has taken appropriate action. See Turner Brothers, Inc. v. OSM, 92 IBLA 320, 323 (1986). Where OSM finds that the State has failed to take appropriate action to cause the violation to be abated, it is obligated to conduct an inspection. If, as a result of its inspection, OSM determines that the permittee remains in violation of the State program, it is required to issue an NOV where the violation does not create an imminent danger to public health or safety and is not causing or reasonably expected to cause a significant, imminent environmental harm to land, air, or water resources. See 30 CFR 843.12(a)(2); Dora Mining Co. v. OSM, supra at 302.

In the present case, OSM had, as a result of a December 3, 1992, inspection by OSM inspector Mitchell S. Rollings, reason to believe that Powderhorn was in violation of certain provisions of the Colorado program relating to the reclamation of coal mine waste banks. At the time of his inspection, Rollings concluded that Powderhorn had failed to cover the completed portions of two coal mine waste banks (known as Cameo Refuse Disposal Areas (CRDA) Nos. 1 and 2) at the Roadside/Cameo No. 1 mine with "a minimum of 4 feet of the best available non-toxic and non-combustible material," as required by Rule 4.10.4(5) of the Colorado program. 3/ In addition, Rollings determined that Powderhorn had failed to undertake such action "as contemporaneously as practicable with mining operations," in accordance with Rule 4.13 of the Colorado program. 4/

The record indicates that, during the course of mining operations at the Roadside/Cameo No. 1 mine, Powderhorn generated waste materials (consisting largely of poor quality, fine grained coal and some shale and sandstone) as a result of washing the coal extracted from the mine. See Tr. 20, 175. These materials were required to be stored in permanent coal mine waste banks within the permit area. Each of these banks was to consist of a series of "lifts," i.e., piles composed of a succession of 2-foot

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3/ Rule 4.10.4(5) provides that

"[f]ollowing grading of the coal mine waste bank, the site shall be covered with a minimum of 4 feet of the best available non-toxic and non-combustible material * * *. The coal mine waste bank shall be revegetated in accordance with [rule] 4.15. [DMG] may allow less than 4 feet of cover material based on physical and chemical analyses which show that the requirements of [rule] 4.15 will be met."

Rule 4.15.1(1) of the Colorado program requires in general that a mine operator "establish on all affected land a diverse, effective and permanent vegetation cover."

4/ Rule 4.13 provides that "[r]eclamation efforts, including, but not limited to, * * * topsoil replacement and revegetation, of all land that is disturbed by surface coal mining operations shall occur as contemporaneously as practicable with mining operations."

compacted layers of waste material with sloping sides rising 50 feet to a 10-foot wide bench or terrace and topped by succeeding lifts of 30 feet
separated by benches. See Tr. 21, 24-25, 25-26, 27, 131-32, 164; Exhs. R-2, R-4, R-5, and A-7B at 4. At the time of the December 1992 inspection, Powderhorn had already commenced construction of two coal mine waste banks (CRDA Nos. 1 and 2) within the permit area. See Tr. 20, 102, 103; Exh. A-7B at 4. CRDA No. 1 included 3 lifts that had been completed by February 1986 and CRDA No. 2 consisted of 2 lifts that had been completed by October 1991. See Tr. 24-25, 25-26, 30, 33-34, 35-36, 103, 166, 167; Exhs. R-6 and R-7.

In December 1992, Rollings found that Powderhorn had, at that time, failed to cover the exposed faces of the completed lifts in the two coal mine waste banks with any appropriate material. See Tr. 30, 31-32; Exh. R-8 at 6, 7. He also noted that this failure had persisted since the completion of the lifts in February 1986 (in the case of CRDA No. 1) and October 1991 (in the case of CRDA No. 2). See Tr. 32, 37. Accordingly, he issued TDN No. 92-020-370-003 to the State on December 11, 1992, notifying it that Powderhorn had failed to cover the coal mine waste banks with appropriate material contemporaneously with mining operations, in violation of Rules 4.10.4(5) and 4.13. See Tr. 37-38; Exh. R-8 at 1.

In response to the TDN, DMG notified OSM by letter dated December 29, 1992, that it did not believe that Powderhorn had violated Rules 4.10.4(5) and 4.13. The basis for this position was that, although Powderhorn had not covered the coal mine waste banks with appropriate material contemporaneously with mining operations, it was not practicable to do so since DMG had yet to determine whether it was necessary to place a minimum of 4 feet of such material on the completed lifts. DMG noted that any effort to do so (absent such a determination) might unnecessarily disturb the area which would provide the cover material, and, in any case, reclamation was assured by virtue of the existence of an adequate bond. See Exh. R-9 at 2. Hence, DMG initially took no enforcement action. See Tr. 41.

The record indicates that Powderhorn had been authorized under its State permit, pursuant to Rule 4.15.6 of the Colorado program, to conduct a field trial study on another coal mine waste bank for the purpose of demonstrating whether less than 4 feet of appropriate material would permit the adequate revegetation of the coal mine waste banks in the permit area (including CRDA Nos. 1 and 2). 5/ See Tr. 45, 53, 165; Exhs. A-7D at 1, R-1 at 6, and R-9 at 1, 4. In the event that DMG determined, on the basis of this study, that the banks could be adequately revegetated with less than
4 feet of appropriate material, it was authorized by Rule 4.10.4(5) to allow the placement of less than 4 feet of such material. Powderhorn's engineer testified that there was reason to believe based on studies that less than
4 feet of cover would work (Tr. 144-45).

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5/ Rule 4.15.6 provides that a "permittee shall be encouraged to establish small test plots of limited planned duration, intended to assess the effectiveness of proposed * * * revegetation plans."

The study was originally intended to last only 5 years and the permit terms at the time of the OSM inspection provided the study was to be completed in 1988 (Tr. 78; Exh. R-1 at Stip. 6; Exh. R-9 at 1). The record indicates that results of the 1988 study were submitted to DMG which found the results inconclusive. Although the DMG staff recommended approval of less than 4 feet conditioned upon a "demonstration that revegetation success criteria be met in the field trials during years 9 and 10," no amendment of the permit was undertaken prior to the OSM inspection (Tr. 148; Exh. R-9 at 2).

Upon review of the DMG response to the TDN, OSM determined on January 15, 1993, that the State had failed to take appropriate action in response to the TDN. In a letter of that date to DMG, OSM noted that the permit had not been revised to authorize use of less than 4 feet of cover material on the lifts conditioned upon results of an extended field trial (Tr. 48; Exh. R-10 at 3).

Thereafter, responding to the OSM assertion that DMG had not taken appropriate action to abate the violation, DMG issued NOV No. C-93-004 on January 29, 1993, citing Powderhorn with a violation of Rules 4.10.4(5) and 4.13 due to its "failure to perform contemporaneous reclamation" on the five completed lifts that make up CRDA Nos. 1 and 2 (Tr. 51-52; Exh. R-11 at 4-5). The required abatement for the NOV involved filing a technical revision of the permit with DMG containing a two-part stipulation by Powderhorn. First, Powderhorn was required to submit the results of the 1993 vegetation study to DMG by September 1, 1993, with DMG agreeing to make a finding on the acceptable cover depth within 30 days (Exh. R-11 at 6). Further, Powderhorn was required to stipulate to placing "4 foot or depth approved by [DMG], of non-toxic, non-combustible cover on lifts 1, 2 and 3 of CRDA No. 1, and lifts 1 and 2 of CRDA No. 2 by September 1, 1994" (Exh. R-11 at 6). The time for abatement was specified in the NOV as March 16, 1993 (Exh. R-11 at 5). It appears from the record that Powderhorn complied with the abatement requirements of the NOV issued by DMG (Tr. 160).

OSM found that the abatement measures required in the NOV issued by DMG did not "adequately require compliance with the approved State program" (Exh. R-12 at 1). Specifically, OSM objected that "[d]eferral of on-the-ground abatement of these violations for another one and a half years is inappropriate" (Exh. R-12 at 1). OSM took the position that abatement was required within 90 days (Tr. 55). According to OSM, the relevant rule required 4 feet of cover material on coal mine waste banks unless DMG has approved a different depth based on an approved analysis. Since no approval had been granted for a lesser depth, Powderhorn was obligated to cover the completed lifts with 4 feet of cover material (Exh. R-12 at 2). The OSM response also stated that DMG had not provided documentation from the approved permit that the field trials had been extended. Id.

As a consequence of the OSM finding, inspector Rollings conducted a follow-up inspection of the permit area on February 22, 1993, observing that no effort had been made to cover the completed lifts that make up CRDA Nos. 1 and 2 with appropriate material. See Tr. 62; Exh. R-13 at 3, 6. On

February 23, 1993, he issued NOV No. 93-020-370-001, citing Powderhorn for violation of Rules 4.10.4(5) and 4.13. See Exh. R-13 at 1-2. For abatement measures, Powderhorn was required by the NOV to cover the completed lifts with 4 feet of appropriate material by April 23, 1993. 6/ See Exh. R-13 at 2.

On March 24 and 26, 1993, Powderhorn, pursuant to section 525 of SMCRA, 30 U.S.C. § 1275 (1988), filed applications seeking review of OSM's NOV and temporary relief therefrom. The case was assigned to Judge Child, who conducted a 2-day hearing into the matter on June 1 and 2, 1993. At the conclusion of the hearing, Judge Child granted Powderhorn's application for temporary relief. OSM has appealed to the Board from this order.

Pursuant to section 525(c) of SMCRA and its implementing regulations, the Secretary of the Interior, and his delegated representatives, are authorized to grant temporary relief from an NOV pending a decision on an application for review of that NOV, where, among other things, the applicant for such relief shows that "there is a substantial likelihood that the findings and decision of the administrative law judge in the matters to which the application relates will be favorable to the applicant." 43 CFR 4.1263(b); 30 U.S.C. § 1275(c) (1988); see Shamrock Coal Co. v. OSM, 81 IBLA 374, 376 (1984), appeal dismissed, Shamrock Coal Co. v. Hodel, No. 84-238 (E.D. Ky. May 13, 1987). In addition, there must be a showing that granting the application for temporary relief will not have an adverse affect on public health or safety or cause significant, imminent environmental harm to land, air, or water resources. See 30 U.S.C. § 1275(c) (1988); 43 CFR 4.1263(c).

There is no question in the present case that affording Powderhorn relief from the requirement to reclaim the subject land pending a decision by Judge Child on its application for review of the NOV will not adversely affect the public health or safety or cause significant, imminent environmental harm to land, air, or water resources. This is supported by the record and is undisputed by the parties. See Tr. 100, 191, 193-94; Application for Temporary Relief, dated Mar. 25, 1993, at 10-11; OSM's Brief Objecting to the Administrative Law Judge's Grant of Temporary Relief at 19. Thus, we hold that Judge Child properly determined that this was the case.

[1] Rather, the question of whether Judge Child properly granted Powderhorn temporary relief from the NOV turns on whether Powderhorn
demonstrated that there was a substantial likelihood that it would succeed on the merits of its application for review of the NOV. It is true that Judge Child's ruling from the bench at the conclusion of the hearing was ambivalent regarding Powderhorn's showing of likelihood of succeeding

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6/ By verbal order dated Apr. 21, 1993, Judge Child amended the abatement deadline, in accordance with a stipulation of the parties, to June 2, 1993. See Tr. 70.

on the merits of its application for review. As OSM points out, Judge Child in applying the test of substantial likelihood found that the standard was met while acknowledging that "[t]here [was] an equal likelihood that [his decision on the application for review] might go the other way" (Tr. 214) and by reaffirming that his decision "could go either way" (Tr. 215).
On appeal to the Board, OSM challenges this ruling asserting that these expressions are inconsistent with a determination that Powderhorn had shown a substantial likelihood that it would prevail.

The statute and regulations do not define the term "substantial likelihood" and we have not been presented with citation to any prior Board precedent on this issue. We think the standard for this term must be defined in a manner consistent with the nature of the relief which the statutory provision provides, i.e., a stay or injunction pending administrative review on the merits. One of the basic criteria applied by courts and by this Board in its quasi-judicial administrative review role when considering such relief is the moving party's likelihood of success on the merits. See, e.g., Placid Oil Co. v. U.S. Department of the Interior, 491 F. Supp. 895 (N.D. Texas 1980); Marathon Oil Co., 90 IBLA 236, 93 I.D. 6 (1986); 43 CFR 4.21(b)(2) (58 FR 4943 (Jan. 19, 1993)). Where the balance of hardship to the parties from not granting temporary relief tips decidedly in favor of the applicant, we find that in order to justify temporary relief it is not necessary that the applicant's right to prevail on the merits of the controversy be free from doubt where he "has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation." Hamilton Watch Co. v. Benrus, 206 F.2d 738, 740 (2nd Cir. 1953), quoted in Placid Oil Co. v. U.S. Department of the Interior, 491 F. Supp. at 905; Sierra Club, 108 IBLA 381, 384-85 (1989). Upon review of the record in the present case, we must affirm the Administrative Law Judge on the ground that this standard has been met. 7/

Assessment of Powderhorn's probability of success on the merits ultimately hinges on the question of whether OSM properly concluded that the State had failed to take appropriate action in response to the TDN, thus justifying an inspection of the permit area and issuance of the NOV by OSM. Powderhorn does not argue that the State's failure to do anything in December 1992 constituted appropriate action. Rather, it contends that DMG's issuance of the State NOV in January 1993 was appropriate action. See Tr. 11-12; Application for Review, dated Mar. 23, 1993, at 6-7. Powderhorn objects to OSM's conclusion that the abatement provided for in the State NOV was inappropriate. See Tr. 171-72; Application for Review, dated Mar. 23, 1993, at 7-9.

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7/ Regardless of any deficiency perceived by OSM in the wording of the Administrative Law Judge's ruling from the bench, we note that the Board
is vested with de novo review authority to decide the question on appeal from the decision of the Administrative Law Judge. U.S. Fish & Wildlife Service, 72 IBLA 218 (1983).

Action by DMG which is not "arbitrary, capricious, or an abuse of discretion" under the State program shall be considered "appropriate action" to secure abatement of a violation. 30 CFR 842.11(b)(1)(ii)(B)(2). Based on the record established at the hearing, we must uphold the finding of the Administrative Law Judge that Powderhorn established a substantial likelihood of success on the ground that the State NOV was not an abuse of discretion under the State program and, hence, that the OSM citation was improvidently issued.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision by Judge Child granting Powderhorn's application for temporary relief is affirmed.

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C. Randall Grant, Jr.
Administrative Judge

I concur:

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Gail M. Frazier
Administrative Judge